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**BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

NORMAN D. NORTHRUP,

Appellant,

v.

**KLICKITAT COUNTY and STATE
OF WASHINGTON, DEPARTMENT
OF ECOLOGY,**

Respondents.

SHB NO. 92-40

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

This matter was heard by the Shorelines Hearings Board ("Board") on June 4, 1993, in White Salmon, Washington. Robert V. Jensen, attorney member, presided. Harold S. Zimmerman, Chairman, and Richard C. Kelley, member also sat for the Board. Members, David Wolfenbarger, O'Dean Williamson, and Bobbi Krebs-McMullen read the transcript of the hearing and reviewed the exhibits.

The proceedings were recorded by Renae Smith, court reporter, affiliated with Rider & Associates, of Vancouver, Washington.

Norman Northrop appeared pro se. Klickitat County ("County") was represented by Deputy Prosecuting Attorney, Knute Rife. The Department of Ecology did not participate in the hearing.

Having considered the testimony and argument; and having examined the exhibits, the Board makes these:

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
SHB NO. 92-40**

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FINDINGS OF FACT

I

Norman Northrop ("Northrop") and his wife, lease from Pacific Power and Light Company ("PPLC") an approximately one acre cabin site at Northwestern Lake in Klickitat County.

II

Northwestern Lake is an artificial impoundment of the White Salmon River, a shoreline of statewide significance. The county line between Klickitat and Skamania Counties splits the lake, so that the eastern shore, where Northrop is located, is within Klickitat County. There are seven cabins on the Klickitat County side, and approximately 35 on the Skamania side. The Klickitat County Shoreline Master Program ("KCSMP") environmental designation, for the Klickitat County shoreline in this area, is conservancy.

III

Northrop's cabin is a one story cabin which lies an average of 29 feet from the ordinary highwater mark of the lake. At its closest point, the cabin is 20 feet horizontally from the lake. The cabin lies on a bench which rises above the lake about ten feet. Lakeward of the cabin are coniferous trees which render the cabin inconspicuous from the lake. The cabin occupies about 600 square feet of floor space. It is served by septic tank and drainfield.

IV

To the east of the cabin is another bench, about 18 feet above the cabin. The entrance road and the water main to the property are on or in this bench. Beyond this lies another bench which is approximately 50 feet above and 170 feet landward of the lake. On this bench lies an open field.

V

Northrop proposes to add a two-story extension to the south of the cabin. The addition would contain 600 to 800 square feet of floor space. the roof would be pitched, on a north-south axis, and would occupy 300 to 400 square feet. The addition would require a variance from the County. In 1990, the KCSMP was revised to increase the setbacks in conservancy areas to 100 feet, and the minimum shoreline frontage for a parcel, 660 feet. These revisions made Northrop's structure and the lot nonconforming.

VI

PPLC, the landlord, approved Northrop's variance request.

VII

Northrop's cabin could continue to be utilized as a residence, were the variance denied.

VIII

The Washington State Department of Fisheries ("Fisheries"), submitted a written letter to the County, opposing the granting of the variance. Fisheries stated that it, and the Yakima Indian Nation, were assessing the feasibility of reintroducing salmon runs in the White Salmon River. Fisheries was concerned that land management practices continue, which: "undermine water quality and future salmon enhancement opportunities, including past and present development within environmentally sensitive shoreline areas which now potentially threatens this resource more than ever". Fisheries was especially concerned about potential runoff from residential development, including that from septic tank drainfields. It urged the County to approve on-site waste disposal systems, only where the densities and the frequency of discharge contaminants would insure little or no impact on the ground or surface water. It concluded its comments by recommending denial of the variance, as follows:

1 *Klickitat County is recognized for its scenic beauty and wildlife*
2 *resources which provide a significant economic base through*
3 *hunting, fishing, camping, and other outdoor recreational*
4 *activities. WDF maintains that 29 feet is an entirely inadequate*
5 *setback from the ordinary high water mark and recommends that*
6 *Klickitat County derry this variance request to ensure the*
7 *protection of county an [sic] state fish and water resources and to*
8 *minimize and avoid future losses of life, property, future county*
9 *expenditures for private bank protection and loss of public*
10 *resources. Future problems associated with water quality, fish*
11 *habitat, public safety, and bank erosion could be avoided if*
12 *ordinances enacted to restrict shoreline development are*
13 *enforced.*

14 IX

15 The Underwood Conservation District ("District") and the Columbia Gorge Audubon
16 Society ("Audubon") also objected, in writing, to the variance. The District pointed out that,
17 in 1989, it had identified Northwestern Lake residential development as a major nonpoint
18 source of pollution to the White Salmon River. The basis of concern was the high density of
19 vacation homes located close to the lake. The District concluded that expansion of the size of
20 Northrop's cabin would result in expanded use, which would increase the risk to the river, in
21 the event of inadequate or failing septic tanks.

22 X

23 Audubon objected on the basis of the cumulative effect of granting variances, such as
24 that proposed by Northrop. Audubon cited the fact that PPLC is in the process of applying for
25 relicensing of the Northwestern Lake impoundment, and that the company would be expected
26 to provide restoration of fish passage and access to the upper White Salmon River.

27 XI

The lessee of the parcel adjoining Northrop on the south, submitted comments to the
County, supporting the variance, provided certain conditions were met.

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XII

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.
From these Findings of Fact, the Board issues these:

CONCLUSIONS OF LAW

I

The Board has jurisdiction over this matter. RCW 90.58.180.

II

Northrop, having appealed the denial of a variance by the County, has the burden of proof before the Board. RCW 90.58.140(7).

III

Variances are exceptions to the rule. The Shoreline Management Act ("SMA") is to be liberally construed on behalf of its purposes. RCW 90.58.900; Clam Shacks v. Skagit County, 109 Wn.2d 91, 93, 97, 743 P.2d 265 (1987). See Mead School Dist. v. Mead Education, 85 Wn.2d 140, 145, 530 P.2d 302 (1975) (holding that the liberal construction command of the Open Public Meetings Act implies an intent that the Act's exceptions be narrowly confined).

IV

The Northrop cabin lies in a conservancy environment. The purpose of that environment is described as follows in the KCSMP:

The purpose and intent of the conservancy environment is to protect, conserve and manage existing natural resources and/or unique, valuable, aesthetic, historic and cultural areas in order to achieve sustained resource utilization and provide recreational opportunities. The conservancy environment is also intended to protect environmentally sensitive areas which are not suitable for intensive use, such as steep slopes, flood-prone areas, eroding bluffs, natural wetlands, and areas which cannot provide adequate sewage disposal.

1
2 *The conservancy environment is characterized by very low*
3 *intensity land uses primarily related to natural resources use and*
4 *diffuse recreational development, relatively low land values,*
5 *relatively minor public and private capital investment, and/or*
6 *relatively severe biophysical limitations. Examples of uses that*
7 *are appropriate in a conservancy environment include dispersed*
8 *outdoor recreation activities, timber harvesting on a sustained*
9 *yield basis, passive agricultural uses such as approved grazing,*
10 *and/or non-intensive cultivation practices.*

11 *The preferred uses are those which are nonconsumptive of the*
12 *physical and biological resources on a sustained basis while*
13 *minimally reducing opportunities for other future uses of the*
14 *resources in the area. Activities and uses of a nonpermanent*
15 *nature which do not substantially degrade the existing character*
16 *of the area are preferred uses for the Conservancy Environment.*
17 *The right of residential development, of limited density, on*
18 *private lands, is recognized, with limitations.*

19 V

20 The relevant policies of the KCSMP provide:

- 21 1. Residential development should be designed at a level
22 of density lot coverage, height of structure, and occupancy, compatible with the
23 physical capabilities of the shoreline and water.
- 24 5. Encourage new residential development to locate along
25 shorelines only where public water and sewage disposal are available.

26 KCSMP p. 4-40, A. Policies.

27 VI

The applicable KCSMP regulation for the Conservancy Environment, mandates that:

Site criteria for residences on shorelines of state-wide significance include a minimum
100 foot setback from ordinary high water mark, and a minimum 660 foot river
frontage.

KCSMP p. 4-42, B. Regulations 12, Conservancy.

VII

The KCSMP contains restrictive non-conforming development standards, which are
substantially identical to WAC 173-14-055.

1
2 In pertinent part, these standards provide:

3 *A nonconforming development is defined as a shoreline use or*
4 *structure which was lawfully constructed or established prior to*
5 *the effective date of the Shoreline Management Act, but which*
6 *does not conform to present regulations or standards of the*
7 *program or policies of the act.*

8 *Nonconforming development may be continued provided that it is*
9 *not enlarged, intensified, increased, or altered in any way which*
10 *increases its nonconformity.*

11 KCSMP p. 5-6, NONCONFORMING DEVELOPMENT STANDARDS (WAC 173-14-055).

12 VIII

13 The SMA recognizes the following preference for uses, in the stated order of priority:

- 14 (1) Recognize and protect the state-wide interest over local interest;
- 15 (2) Preserve the natural character of the shoreline;
- 16 (3) Result in long term over short term benefit;
- 17 (4) Protect the resources and ecology of the shoreline;
- 18 (5) Increase public access top publicly owned areas of the shorelines;
- 19 (6) Increase recreational opportunities for the public in the shoreline;
- 20 (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or
- 21 necessary.

22 RCW 90.58.020.

23 IX

24 All development proposed on shorelines of statewide significance must be reviewed for

25 consistency with the policy of the SMA for shorelines of statewide significance. RCW

26 90.58.140(1); Washington Environmental Council v. Department of Transportation, SHB No.

27 86-34 (1988).

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The County Planning Commission, in denying the variance, entered findings of fact, which were approved by the Board of County Commissioners, when they affirmed this action. Among other things, the Planning Commission found that the applicant had not indicated that he could not make a reasonable use of his land, by complying with the provisions of the KCSMP; that existing circumstances would allow the applicant the reasonable opportunity to use the property; and that the granting of the variance would not preserve the public interest and welfare.

XI

Hearings before the Board are de novo. RCW 90.58.140; WAC 461-08-175. We believe that Northrop has failed to establish that the denial of the variance would preclude or significantly interfere with a reasonable use of the property not otherwise prohibited by the master program, under WAC 173-14-150(2)(a).

XII

The KCSMP, in establishing its restrictive non-conforming use standards, has in effect determined that uses which are grandfathered in, under those standards, are "reasonable uses" The obvious intent of the nonconforming regulation, is to prohibit expansion of such uses, with the goal of ultimately achieving, in the regulated area, the goal of the new regulation. In this case, that goal, primarily, is to attain a setback of structures from the water's edge, of 100 feet. Such a goal is obviously thwarted when a nonconforming use is allowed to expand, or increase its occupation of that setback area, with permanent structures.

XIII

Moreover, what is a reasonable use is based on an objective standard, not on the desires of a particular applicant. The question is whether the existing structure provides a

1 reasonable use for the hypothetical reasonable user of the shoreline. Northrop presented no
2 evidence to show that a 600 foot square cabin does not constitute a reasonable use, under that
3 standard.
4

5 XIV

6 We also conclude that the granting of the variance would constitute a grant of special
7 privilege, not enjoyed by other properties in the area, contrary to WAC 173-14-150(2)(d).
8 Northrop admitted to this in his testimony. He submitted no evidence that any variances had
9 been granted by the County to any nonconforming structures on Northwestern Lake.

10 XIV

11 The variance would also be detrimental to the public interest, in violation of WAC 173-
12 14-050(2)(e). The evidence reveals that various entities are working to reintroduce
13 anadromous fish runs to the White Salmon River. This issue will be raised in the relicensing
14 application proceedings of Pacific Power and Light, before the Federal Energy Regulatory
15 Commission ("FERC"). The density of development along the White Salmon River is a
16 matter of statewide concern, because of the relationship between that density and the suitability
17 of the river as fish and wildlife habitat.

18 XV

19 Similarly, the proposed development is inconsistent with WAC 173-14-150(4), which
20 requires that:

21 *In the granting of all variance permits, consideration shall be*
22 *given to the cumulative impact of additional requests for like*
23 *actions in the area. For example if variances were granted to*
24 *other developments in the area where similar circumstances exist*
25 *the total of the variances shall also remain consistent with the*
26 *policies of RCW 90.58.020 and shall not produce substantial*
27 *adverse effects to the shoreline environment.*

11 We note that the area is not sewered. Significantly increasing the size of residential cabins
12 would allow more intensive human use of structures, and commensurately more discharge into
13 the fragile environment of the White Salmon River. This is inconsistent with both the
14 Conservancy Environment and the classification of the White Salmon River as a shoreline of
15 statewide significance.
16

17 XVI

18 Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
19 From the foregoing, the Board issues this:
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ORDER

Klickitat County's denial of a variance to Norman Northrop, to construct a 600-800 square foot addition to his cabin on Northwestern Lake and the White Salmon River; which addition is within the 100 foot setback line established by the County in its shoreline master program, is affirmed.

DONE this 15th day of July, 1993.

SHORELINES HEARINGS BOARD


ROBERT V. JENSEN, Presiding


HAROLD S. ZIMMERMAN, Chairman


RICHARD C. KELLEY, Member


BOBBI KREBS-McMULLEN, Member


DAVID WOLFENBARGER, Member


O'DEAN WILLIAMSON, Member

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